No. 18-485

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below).

PARTIES TO THE PROCEEDING

Edward G. McDonough, petitioner on review, was the plaintiff-appellant below.

Youel Smith, individually and as Special District Attorney for the County of Rensselaer, New York, AKA Trey Smith, respondent on review, was the defendant-appellee below.

John J. Ogden, Richard McNally Jr., Kevin McGrath, Alan Robillard, County of Rensselaer, John F. Brown, William A. McInerney, Kevin F. O'Malley, Daniel B. Brown, and Anthony J. Renna were defendants below, but are not parties to this petition.

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BRIEF FOR PETITIONER

INTRODUCTION

To "depriv[e] a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured" is "inconsistent with the rudimentary demands of justice." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam). That is especially so when a state official himself fabricates the false evidence. "The principle that a State may not knowingly use false evidence" is "implicit in any concept of ordered liberty." *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

Petitioner Edward McDonough endured what the Constitution "cannot tolerate." *Miller* v. *Pate*, 386 U.S. 1, 7 (1967). He twice stood trial—and was ultimately acquitted—on dozens of criminal charges based on fabricated evidence. Much of the evidence was fabricated by Respondent Youel Smith, the prosecutor in McDonough's case. Smith's conduct was egregious: He forged witness affidavits in a pre-trial investigation and falsified other evidence presented in grand jury proceedings and at both of McDonough's trials. A state investigator working with Smith, in addition to several witnesses—many of whom ultimately pled guilty on criminal charges—also fabricated evidence at Smith's urging.

McDonough's first trial ended in a mistrial, and Smith chose to try McDonough a second time. On December 21, 2012, at the end of his second trial, McDonough was acquitted. Less than three years later, on December 18, 2015, he filed this Section 1983 suit against Smith and others. McDonough's suit is what Section 1983 is all about: He alleges that his constitutional rights were violated because he was subjected to criminal proceedings—and devastating financial, reputational, and emotional consequences—on the basis of fabricated evidence. There is no dispute that New York's three-year statute of limitations applies to his Section 1983 claim. The question presented is whether McDonough's suit, brought less than three years from his ultimate acquittal, is timely.

The answer is yes, for three independent reasons. *First*, this Court should simply adopt the limitations rule applicable to the most analogous common law tort, as it did in *Wallace* v. *Kato*, 549 U.S. 384 (2007).

Here, McDonough challenges the wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence; the closest common law analog to his Section 1983 claim is therefore malicious prosecution. *Heck* v. *Humphrey*, 512 U.S. 477, 483-484 (1994). At common law, the statute of limitations on a malicious prosecution claim does not begin to run until criminal proceedings terminate in the defendant's favor. *Id.* at 489. The rationale for that rule at common law is fully applicable to Section 1983 fabrication of evidence suits like McDonough's, and borrowing the limitations rule for malicious prosecution is compatible with the "values and purposes of the constitutional right at issue." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 921 (2017) ("*Manuel I*"). The Court should therefore apply that limitations rule here. Because McDonough filed suit within three years of his acquittal, his suit is timely. Borrowing the limitations rule from the most analogous tort, moreover, is straightforward: There would be no need for the Court to determine the elements of the Section 1983 claim or otherwise analyze the cause of action.

Second, McDonough's claim is timely under the so-called "standard" federal rule of accrual. Under that rule, the limitations period begins to run when the plaintiff has "a complete and present cause of action" and can actually bring suit. *Bay Area Laundry & Dry Cleaning Pension Tr. Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (internal quotation marks omitted). McDonough was not able to sue until his acquittal for two reasons. First, in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), as well as in *Heck*, this Court made clear that habeas corpus—rather than Section 1983—is the exclusive avenue for a suit

by a criminal defendant challenging the lawfulness of his custody. *See id.* at 500. Because McDonough was in custody for purposes of *Preiser* throughout the criminal proceedings, he could not file this Section 1983 suit prior to his acquittal. His claim accordingly did not accrue until that point. Second, even if *Preiser* did not determine the accrual rule in this case, this Court should adopt favorable termination as an element of McDonough's fabrication of evidence claim, in order to prevent premature Section 1983 suits attacking ongoing criminal proceedings. *See Heck*, 512 U.S. at 483-484. Thus McDonough did not have a complete cause of action until his acquittal. For that reason, too, McDonough's suit was filed within the limitations period.

Third, McDonough's suit is timely for a final, independent reason: Where a plaintiff suffers a continuing violation of her constitutional rights, the statute of limitations does not begin to run until the wrong ends. *See Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380-381 (1982). Here, the constitutional violation McDonough complains of is the initiation and maintenance of criminal proceedings based on fabricated evidence, and the resulting deprivation of his liberty. That constitutional violation did not conclude the first time fabricated evidence was used against McDonough, but instead extended to his acquittal. *See Whelan* v. *Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992) (Silberman, J., joined by Ginsburg, J.). Because McDonough filed suit within three years of the termination of the proceedings against him, his suit is timely under the continuing violation doctrine.

In short, three independent paths for determining the statute of limitations rule all lead to the same result: McDonough's suit is timely. Requiring a criminal defendant to file a civil suit before criminal proceedings terminate will waste judicial resources, impose unnecessary burdens on state officials, and dissuade criminal defendants from bringing meritorious claims. This Court should reverse.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-19a) is reported at 898 F.3d 259. The District Court's opinions (Pet. App. 20a-84a, 85a-135a) are not reported, but are available at 2016 WL 5717263 and 2016 WL 7496128. The Second Circuit's order denying rehearing en banc (Pet. App. 136a-137a) is not reported.

JURISDICTION

The Second Circuit entered judgment on August 3, 2018. Petitioner filed a timely petition for rehearing en banc, which was denied on September 12, 2018. This Court granted certiorari on January 11, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Section 1983 of Title 42 of the U.S. Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * .

STATEMENT

A. Factual Background

In 2009, an investigation uncovered fraud in a primary election in Troy, New York. Pet. App. 24a-28a. Several dozen applications for absentee ballots, as well as the absentee ballots themselves, had been forged. *Id.* At the time, McDonough was the Democratic Commissioner of the Rensselaer County Board of Elections. *Id.* at 24a.[1]

Investigators identified a number of suspects, including John Brown, a Democratic member of the city council; Kevin McGrath, a Democratic Party candidate; and William McInerney, the Troy City Clerk. *Id.* at 24a, 27a. McInerney had worked on the incumbent district attorney's election campaign. *Id.* at 28a. To avoid the appearance of impropriety, the district attorney asked a court to appoint a special prosecutor "for all purposes, including investigation, prosecution and disposition" of the election fraud matter. JA286-287. Smith was appointed as "Special District Attorney for all purposes in this matter up to and including the disposition of this case." JA288-289. Once appointed, Smith became "actively engaged in the investigation." Pet. App. 29a; JA96-97, ¶ 326. New York State police officer John Ogden assisted Smith in the investigation. JA96-97, ¶¶ 323, 330.

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[1] The facts are drawn from McDonough's complaint and the opinions below. On a motion to dismiss, the Court must "accept as true all the factual allegations in his complaint." *Manuel I*, 137 S. Ct. at 915 & n.1.

Smith's investigation was beyond biased. Although multiple witnesses implicated Brown, McGrath, and McInerney in the forgery scheme, Smith declined to prosecute them. *See* Pet. App. 100a; JA44, ¶ 11. He instead focused his attention on McDonough. Smith leaked to the press that McDonough was the primary target of the investigation—even though Smith lacked probable cause to prosecute McDonough for the forgery. Pet. App. 29a, 105a. Smith then interviewed McDonough repeatedly, urging him to plead guilty. *Id.* at 32a-35a. On one occasion, Smith expressed animosity toward McDonough's father, the local Democratic Party Chair, who had "turned his back" on Smith's ambitions to run for district attorney. *Id.* at 34a (internal quotation marks omitted).

When it became clear that McDonough would not plead guilty, Smith fabricated evidence implicating McDonough in the forgery. In March 2010, six months before the grand jury was empaneled, Smith and Ogden assisted McGrath in drafting a sworn statement that "falsely incriminated" McDonough. JA146-147, ¶¶ 615-620; JA150-151, ¶¶ 632-635; *see* Pet. App. 34a; JA291; JA296-299. Smith and Ogden also interfered with DNA testing that falsely tied McDonough to three envelopes containing forged absentee ballots. *See* JA97, ¶¶ 327-329; JA162-163, ¶¶ 692-703 (Smith directed laboratory to use his "new" method for DNA extraction after test results under established protocols were negative); *see also* Pet. App. 104a.

In September 2010, Smith commenced grand jury proceedings against McDonough. Pet. App. 34a. Smith sought McDonough's indictment on 38 counts of felony forgery and 36 counts of felony criminal

possession of a forged instrument. *Id.* at 36a. To support those charges, Smith submitted affidavits from witnesses whose ballots or ballot applications had been forged. *See id.* at 55a. Two of those affidavits were fabricated by Smith. *See id.* at 36a-37a, 55a, 99a.[2] Both witnesses testified at one of McDonough's subsequent trials that the signatures on their affidavits had been forged. *Id.* at 37a; *see also* JA181-183, ¶¶ 813-830, JA266-267. One witness also testified that he had never seen the affidavit before, and the other testified that she did not remember having seen it. *See id.* As the trial court stated on the record, "the first witness out of the box says there's a forged instrument that the People presented." JA182, ¶ 822 (emphasis omitted); *see also* JA266-267.

Before the grand jury, Smith submitted the DNA evidence falsely linking McDonough to the forged absentee ballots. Pet. App. 35a. Ogden, meanwhile, testified that he had reviewed the handwriting on the forged absentee ballot applications and concluded that it belonged to the same person. *Id.* Ogden later admitted at trial that his grand jury testimony "was not correct and a mistake." *Id.* at 35a-36a (internal quotation marks omitted).

Kevin O'Malley initially testified before the grand jury that he had been involved in the forgery, without implicating McDonough. *Id.* at 36a. Smith

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[2] Jolene VanVranken's affidavit was submitted to the grand jury. *See* JA264-267, 305. The parties disputed in state court whether Jermaine Joseph's affidavit was also submitted to the grand jury. *See* JA305.

called O'Malley at home following his testimony and instructed him to change his story. *Id.* at 99a; JA176-177, ¶¶ 784-787. O'Malley then returned to the grand jury and testified, falsely, that McDonough had told him to complete certain absentee ballot applications. JA176, ¶ 783. Consistent with his false written statement, McGrath also implicated McDonough before the grand jury. *See* JA42, ¶ 10(t); JA171, ¶ 748. The grand jury indicted McDonough on the felony counts. JA180, ¶¶ 809-810.

Following his indictment, McDonough unsuccessfully moved to disqualify Smith as special prosecutor. Pet. App. 37a. McDonough also contacted the U.S. Attorney's office and requested an FBI investigation into his prosecution. *Id.* at 38a. The FBI assigned an agent to investigate McDonough's complaint, as well as the election fraud. JA201, ¶ 930. The agent gathered sufficient evidence to implicate McInerney in the ballot forgery scheme. Pet. App. 38a. The agent also found that Smith had not told the truth when he informed police that McInerney and Brown could not be prosecuted due to insufficient evidence. *Id.* Following the FBI investigation, state police arrested McInerney on forgery charges. *Id.* at 39a; JA211, ¶ 993. Smith, however, offered McInerney a cooperation agreement, and he pled guilty to one felony count and was sentenced to a 90-day work order. Pet. App. 39a. In exchange for his cooperation, Brown similarly pled guilty to one felony count. *Id.*

Smith's fabrications continued in the months leading up to trial. As part of his pre-trial investigation, he directed McInerney to prepare a written statement falsely implicating McDonough. *Id.* at 65a-67a.

In that statement, McInerney wrote that he was certain McDonough had forged absentee ballots. *Id.* at 65a-66a; *see also* JA280-281, JA284. McInerney's statement served as the basis upon which other witnesses fabricated their testimony. Pet. App. 66a-67a; *see also* JA214, ¶ 1009. At Smith's urging, Brown similarly prepared a written statement falsely implicating McDonough. *See* JA223, ¶¶ 1061-63.

Smith ultimately tried McDonough twice. The first trial ended in a mistrial, and the second trial resulted in acquittal. Pet. App. 5a-6a. At each trial, several witnesses—many of whom had been given cooperation agreements by Smith—falsely testified against McDonough. *Id.* at 40a. McGrath, Brown, O'Malley, McInerney, and Ogden gave the same fabricated testimony that they had provided when the case was under investigation. *See id.*; JA229, ¶¶ 1094-95; JA234, ¶ 1125. Their testimony related in part to the DNA evidence falsely incriminating McDonough. *See* JA164, ¶ 707; JA215, ¶ 1016. Other witnesses also falsely testified against McDonough at each trial. Pet. App. 40a; JA229, ¶ 1094. The testimony of one witness, Anthony Renna, was so patently fabricated that it was stricken in its entirety at McDonough's second trial, and the judge instructed Renna to immediately leave the courthouse. Pet. App. 40a; JA234-235, ¶¶ 1121-26.

McDonough's first trial lasted from January 17 to March 13, 2012, and ended in a mistrial. *See* Pet. App. 5a-6a. McDonough's second trial took place between November 13 and December 21, 2012. *Id.* at

6a.[3] At the end of his second trial, the jury acquitted McDonough. *Id.* at 6a, 41a.

B. Procedural History

McDonough was acquitted on December 21, 2012. *Id.* He filed this Section 1983 suit in the U.S. District Court for the Northern District of New York on December 18, 2015. *Id.* at 23a. The suit raised two claims. First, McDonough alleged that Smith (acting in concert with others, including Ogden and McInerney) violated his constitutional rights by fabricating evidence. *Id.* at 47a. McDonough claimed that his rights were violated under the Fourth, Fifth, Sixth, and Fourteenth Amendments. *See id.* at 49a; *see also* JA252-253, ¶¶ 1209-1213. Second, McDonough alleged that Smith and others were liable under Section 1983 for malicious prosecution. Pet. App. 47a; JA253-254, ¶¶ 1214-18.[4]

The district court held that McDonough suffered a liberty deprivation when he was required to appear at two separate trials and comply with other restrictions imposed by New York law. *See* Pet. App. 57a. The court nevertheless dismissed as untimely

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[3] The date of McDonough's acquittal is in the record. *See* Pet. App. 41a. The other trial dates are not in the record.

[4] Under Second Circuit precedent, malicious prosecution is an independent constitutional violation cognizable under Section 1983. *See, e.g.*, *Garnett* v. *Undercover Officer C0039*, 838 F.3d 265, 278 (2d Cir. 2016). Some Justices have expressed skepticism about whether malicious prosecution itself violates the Constitution. *See Manuel I*, 137 S. Ct. at 925-926 (Alito, J., dissenting); *Cordova* v. *City of Albuquerque*, 816 F.3d 645, 661-666 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment). That question is not presented here.

McDonough's Section 1983 claim based on fabrication of evidence. *Id.* at 48a-53a; *see id.* at 94a. According to the district court, the statute of limitations on that claim began to run when McDonough learned, or should have learned, of the fabricated evidence, which the district court concluded occurred before McDonough's acquittal. *Id.* at 52a-53a. The district court permitted McDonough's malicious prosecution conspiracy claim to proceed against McInerney, citing the written statement in which McInerney fabricated evidence at Smith's direction that implicated McDonough. *Id.* at 64a-69a. The court also permitted McDonough's conspiracy claim to proceed against Ogden. *See id.* at 122a-123a. The district court entered judgment with respect to Smith under Federal Rule of Civil Procedure 54(b), and certified the dismissal of McDonough's claims against Smith for appeal. *Id.* at 4a. McDonough's claims against other parties, including McInerney and Ogden, remain pending today in the district court.

The Second Circuit affirmed. It "acknowledge[d]" that in other circuits a "fabrication cause of action accrues only after criminal proceedings have terminated." *Id.* at 12a.[5] The court nevertheless "disagree[d] with those decisions." *Id.* at 13a. According

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[5] *See Floyd* v. *Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano* v. *Fragozo*, 352 F.3d 939, 959-960 (5th Cir. 2003) (en banc); *Mills* v. *Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King* v. *Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Mondragón* v. *Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008).

to the Second Circuit, "[b]ecause the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted," the statute of limitations begins to run "when he becomes aware of [the] tainted evidence and its improper use" and "his liberty has been deprived in some way." *Id.* at 10a, 13a. The court acknowledged that "there is no dispute in this case that McDonough suffered a liberty deprivation." *Id.* at 10a. It concluded, however, that McDonough learned of the fabricated evidence "at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented." *Id.* at 13a-14a. The Second Circuit accordingly affirmed the district court's dismissal of McDonough's fabrication of evidence claim as untimely. *Id.* at 19a.[6]

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. To determine when the statute of limitations began to run on McDonough's Section 1983 claim, this Court should adopt the limitations rule governing the most analogous common law tort. *Wallace*, 549 U.S. at 388. McDonough alleges that he was wrongfully indicted and forced to endure two trials on the basis of evidence fabricated by a state official. JA252, ¶ 1211. The "gravamen" of his claim is the

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[6] The Second Circuit also affirmed the dismissal of McDonough's malicious prosecution claim against Smith. *See* Pet. App. 17a-19a.

"wrongfulness" of the criminal proceedings against him, and malicious prosecution is therefore the most analogous common law tort. *Heck*, 512 U.S. at 486 n.5; *see also Fitzjohn* v. *Mackinder* (1861) 142 Eng. Rep. 199, 9 C.B. (N.S.) 505 (upholding malicious prosecution claim based on fabricated evidence). In addition, McDonough seeks damages for the period *after* the institution of legal process; his Section 1983 claim is akin to malicious prosecution for that reason as well. *See Wallace*, 549 U.S. at 389-390.

At common law, the statute of limitations for the tort of malicious prosecution did not begin to run until criminal proceedings terminated in the defendant's favor. *See Heck*, 512 U.S. at 489-490; *see also Findley* v. *Bullock*, 1 Blackf. 467, 468 (Ind. 1818). In *Wallace*, the Court adopted wholesale the statute of limitations rule from the most analogous tort at common law. *See* 549 U.S. at 388-390. The Court should do the same here: The fundamental purposes underlying the limitations rule for malicious prosecution—avoiding parallel litigation and protecting criminal proceedings from collateral attack—apply with equal measure to a Section 1983 suit predicated on fabrication of evidence. *See Carpenter* v. *Nutter*, 59 P. 301, 302 (Cal. 1899). Applying that limitations rule in this case, the statute of limitations for McDonough's fabrication of evidence claim did not begin to run until the termination of the proceedings against him, rendering his suit timely.

II. McDonough's Section 1983 suit is also timely under the "standard" federal limitations rule. According to that rule, the limitations period begins "when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry*, 522 U.S. at 201

(quoting *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941)). A plaintiff does not have a complete and present cause of action until each element of his claim has been established and he can "actually sue." *Green* v. *Brennan*, 136 S. Ct. 1769, 1778 (2016). Here, McDonough could not actually sue Smith until his acquittal, for two separate reasons.

First, under *Preiser*, a person in state custody—which includes a criminal defendant released on personal recognizance—may challenge the criminal proceedings against him only through habeas corpus. *See* 411 U.S. at 500; *see also Justices of Bos. Mun. Court* v. *Lydon*, 466 U.S. 294, 300-301 (1984); *Manuel* v. *City of Joilet*, 903 F.3d 667, 670 (7th Cir. 2018) ("*Manuel II*"). *Heck* makes clear that the same principles apply to damages suits. *See* 512 U.S. at 481-483. McDonough thus could not have maintained his Section 1983 suit until his release from custody, which occurred at acquittal. His fabrication claim therefore did not accrue until that point. *See Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 106 (2013) (statutes of limitations generally "commence when the plaintiff is *permitted to file suit*" (emphasis added)).

Second, this Court should adopt favorable termination as an element of McDonough's Section 1983 claim, rendering his suit timely. The Court has "found tort analogies compelling in establishing the elements of a cause of action." *Wilson* v. *Garcia*, 471 U.S. 261, 277 (1985). In *Heck*, the Court borrowed an element of the most analogous tort at common law—there, the element of favorable termination from the tort of malicious prosecution—because the purposes served by the common law element were

applicable to the Section 1983 claim at issue. In particular, the favorable termination requirement avoided parallel litigation and collateral attacks on criminal proceedings. *See* 512 U.S. at 483-486. Those same considerations should govern the accrual rule in this case. If the Court reaches the issue, it should hold that favorable termination is an element of McDonough's Section 1983 claim, and that his claim did not accrue until acquittal for that reason as well.

III. McDonough's suit is also timely under the continuing violation doctrine. It is black-letter law that where a plaintiff complains of a "continuing violation" rather than a "discrete act," the statute of limitations does not begin to run until the violation ends. *Havens Realty*, 455 U.S. at 380-381 (internal quotation marks omitted). This doctrine has deep roots in the common law and has been accepted in a wide variety of settings. *See, e.g.*, *DePaola* v. *Clarke*, 884 F.3d 481, 487 (4th Cir. 2018) (deliberate indifference to medical needs); *Manuel II*, 903 F.3d at 670 (unlawful pretrial detention); *Shackelford* v. *Staton*, 23 S.E. 101 (N.C. 1895) (improper indexing of judgment).

A legal proceeding "is a continuous, not an isolated event, because its effects persist from the initial filing to the final disposition of the case." *Whelan*, 953 F.2d at 673. When a lawsuit is itself wrongful, the "ongoing prosecution" of the lawsuit is a "continuing tort." *Id.* For this reason, the wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence is a continuing violation that does not end until criminal proceedings terminate. *See id.* Because the violation of McDonough's

constitutional rights persisted through his acquittal, the statute of limitations did not begin to run until that point.

IV. Starting the limitations clock at favorable termination serves policy objectives critical to our Constitution and laws. Fabrication of evidence remains a "disturbingly common cause of wrongful convictions." Cert.-Stage Amicus Br. of Criminal Defense Organizations et al. 4. In an area of frequent litigation where the constitutional stakes are high, a clear rule is needed. Favorable termination is a bright-line rule for defendants, public officials, and courts. The Second Circuit's contrary approach—which starts the limitations period depending on the vagaries of when the defendant knew (or even worse, "should have known") that fabricated evidence was used against him—will sow uncertainty for criminal defendants and public officials alike.

Further, because the statute of limitations is a scant one or two years for Section 1983 suits in many states, a contrary rule will force criminal defendants to file a Section 1983 suit while criminal proceedings are still ongoing. Many criminal defendants will decline to do so, particularly if the civil suit would reveal the criminal defendant's trial strategy or create a risk of impeachment. As a result, egregious acts of misconduct will go unpunished. Other criminal defendants will press ahead and sue, requiring public officials—at a minimum—to move for a stay of civil litigation while criminal proceedings are ongoing, and risking burdensome discovery on both sides.

A rule that obliges "conscientious defense attorneys" to file unripe suits adds to the burdens imposed on criminal defendants, public officials, and

courts, "with no clear advantage to any." *Panetti* v. *Quarterman*, 551 U.S. 930, 943 (2007). This Court should reject the Second Circuit's rule and hold that the statute of limitations for McDonough's fabrication of evidence claim did not begin to run until favorable termination.

ARGUMENT

I. THE STATUTE OF LIMITATIONS FOR MCDONOUGH'S SECTION 1983 FABRICATION CLAIM DID NOT BEGIN TO RUN UNTIL FAVORABLE TERMINATION UNDER THIS COURT'S "ANALOGOUS TORT" ANALYSIS.

In its decision below, the Second Circuit held that the "standard" rule for accrual determined when the statute of limitations began to run for McDonough's Section 1983 claim based on fabrication of evidence. Pet. App. 13a. Under that rule, accrual occurs—and the statute of limitations begins to run—"when a plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Id.* at 9a-10a (internal quotation marks omitted). As other courts of appeals have held, however, the "standard" rule of accrual does not always govern the statute of limitations for a Section 1983 claim based on fabrication of evidence. *See, e.g.*, *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015). Instead, under this Court's decision in *Wallace*, the proper approach is to adopt the limitations rule from the most analogous common law tort, and to apply it to McDonough's Section 1983 claim. *See* 549 U.S. at 388-390. The Court thus does not need to delve into what the elements of McDonough's constitutional claim are.

The common law tort of malicious prosecution is the most analogous tort to McDonough's fabrication of evidence claim, and it is governed by a distinctive rule: The statute of limitations does not begin to run until favorable termination. *See Heck*, 512 U.S. at 489. That rule reflects a longstanding principle in Anglo-American courts: that a limitations rule should not encourage civil suits to collaterally attack ongoing criminal proceedings. *See Carpenter*, 59 P. at 302. That principle applies fully to a Section 1983 suit like McDonough's, which seeks to remedy the initiation and continuation of criminal proceedings on the basis of fabricated evidence. This Court should accordingly hold that under *Wallace*, the statute of limitations for McDonough's fabrication of evidence claim did not begin to run until favorable termination.

A. The Analogous Tort At Common Law Provides The Proper Limitations Rule.

In the aftermath of the Civil War, Congress passed the Civil Rights Act of 1871, which created a cause of action against state officials for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Pub. L. No. 42-22, 17 Stat. 13 (codified at 42 U.S.C. § 1983); *see Monroe* v. *Pape*, 365 U.S. 167, 171 (1961). Section 1983 "creates a species of tort liability" for the violation of constitutional rights. *Heck*, 512 U.S. at 483.

Although Section 1983 is a federal cause of action to enforce federal law, in "several respects" it "looks to the law of the State in which the cause of action arose." *Wallace*, 549 U.S. at 387; *see* 42 U.S.C. § 1988(a). One of those respects is the *length* of the

statute of limitations governing a Section 1983 claim. *See Wallace*, 549 U.S. at 387; *see generally Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 157-165 (1987) (Scalia, J., concurring in judgment) (recounting history of borrowing state limitations periods). In particular, this Court has determined that "a State's personal injury statute of limitations should be applied to all § 1983 claims." *Owens* v. *Okure*, 488 U.S. 235, 240-241 (1989). McDonough's suit is accordingly governed by New York's three-year limitations period for personal injury torts. *See* N.Y. C.P.L.R. § 214(5); Pet. App. 9a.

The question of *when* the statute of limitations begins to run, however, "is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388. Instead, that question is "governed by federal rules conforming in general to common-law tort principles." *Id.* The "standard" rule in the federal context is that a limitations period "commences when the plaintiff has a complete and present cause of action." *Bay Area Laundry*, 522 U.S. at 201 (internal quotation marks omitted). That occurs when all of the elements of the plaintiff's claim have been satisfied, and the plaintiff can "actually sue." *Green*, 136 S. Ct. at 1778. But the standard rule does not always govern. This Court has "recognized that statutes of limitations do not inexorably commence upon accrual." *Heimeshoff*, 571 U.S. 99, 106 (2013).

A cause of action may "accrue[] at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit." *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993); *see also Wallace*, 549 U.S. at 390 n.3. In other words, even if the elements of a claim have

been satisfied and the plaintiff can bring suit, the statute of limitations may not begin to run. One area where the Court has not always followed the "standard" limitations rule is Section 1983 suits.

In *Wallace*, this Court held that the statute of limitations for a Section 1983 claim based on unlawful arrest did *not* begin to run when the claim accrued, but instead at a later point dictated by common law principles. There, the criminal defendant sought damages under Section 1983 for his unlawful arrest. *See* 549 U.S. at 387. The Court held that the criminal defendant's cause of action accrued—and that he could have brought suit—"as soon as the allegedly wrongful arrest occurred, subjecting him to the harm of involuntary detention." *Id.* at 388. The statute of limitations for the criminal defendant's Section 1983 claim, however, did *not* begin to run at the moment of arrest. Instead, this Court looked to "the common law's distinctive treatment of the torts of false arrest and false imprisonment," which "provide the closest analogy to claims of the type" under consideration. *Id.* (brackets omitted).

Under the common law rule, the limitations period "begin[s] to run against an action for false imprisonment when the alleged false imprisonment ends." *Id.* at 389 (quoting 2 H. G. Wood, A Treatise on the Limitation of Actions at Law and in Equity § 187d(4), at 878 (rev. 4th ed. 1916), and citing A. Underhill, Principles of Law of Torts 202 (1881)). The Court held that the common law's "distinctive" rule—and not the "standard" rule of accrual—applied to an analogous Section 1983 claim for unlawful imprisonment. *Id.* The Court thus concluded that "to determine the beginning of the limitations period in

this case, we must determine when [the] false imprisonment came to an end." *Id.*

Wallace does not require the Court, in all instances, to import the limitations rule of the common law analog. The common law "serv[es] 'more as a source of inspired examples than of prefabricated components.'" *Manuel I*, 137 S. Ct. at 921. Sometimes, of course, a court *should* "adopt wholesale" the limitations rule "that would apply in a suit involving the most analogous tort," as this Court did in *Wallace*. *Id.* at 920. But in all cases "courts must closely attend to the values and purposes of the constitutional right at issue." *Id.* at 921.

B. The Most Analogous Tort At Common Law Is Malicious Prosecution.

To determine the limitations rule applicable to a claim under Section 1983, then, this Court "look[s] first to the common law of torts." *Id.* at 920. The initial step in that analysis is to identify the most closely analogous tort at common law. *See Wallace*, 549 U.S. at 388-389.

Here, McDonough alleges that his constitutional rights were violated because criminal proceedings were initiated and maintained against him on the basis of fabricated evidence. *See* Pet. 27; *see also* JA252-253, ¶¶ 1209-1213. As McDonough explained in his complaint, he has a "Constitutional right not to be deprived of his liberty, liberty interests or a fair trial as a result of the fabrication of false evidence by a government officer acting in an investigatory capacity." JA252, ¶ 1211. McDonough alleges that he suffered injury from the time of his indictment until his acquittal almost three years later, including during 16 "weeks of two protracted trials that ended

on December 21, 2012." JA250, ¶ 1203; *see also* JA249-251, ¶¶ 1198-1208.

The closest common law analog to the constitutional violation suffered by McDonough is malicious prosecution. That tort makes liable a person who wrongfully "initiates" or "continu[es] * * * criminal proceedings." Restatement (Second) of Torts §§ 653, 655 (1977). The "gravamen" of malicious prosecution is "the wrongfulness of the prosecution." *Heck*, 512 U.S. at 486 n.5; *see also* W. Page Keeton et al., Prosser and Keeton on Torts § 119, at 870 (5th ed. 1984) (stating that the "emphasis" in a malicious prosecution case is on "the misuse of criminal * * * actions as a means for causing harm"). That is the "gravamen" of McDonough's claim here—the "wrongfulness" of a prosecution predicated on fabricated evidence. *Heck*, 512 U.S. at 486 n.5; *see Wallace*, 549 U.S. at 390 (malicious prosecution seeks to remedy the "wrongful institution of legal process" and the "wrongful use of judicial process" (emphasis omitted)). Because McDonough is vindicating his constitutional right to "be free from criminal charges based on a claim of deliberately fabricated evidence," his claim "is similar to the tort of malicious prosecution." *Bradford*, 803 F.3d at 388 (internal quotation marks and alterations omitted).[7]

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[7] McDonough raised both malicious prosecution and fabrication of evidence claims in this suit. The district court dismissed McDonough's malicious prosecution claim against Smith on absolute immunity grounds. Pet. App. at 109a-110a. The district court noted that a different immunity analysis would apply to McDonough's fabrication of evidence claim, but did not reach the question. *Id.* at 112a-114a. "[A]bsolute immunity does not extend" to an action "against a prosecutor for conduct

Certain fabrication of evidence claims may be analogous to other common law torts. If a plaintiff brought a Section 1983 suit seeking damages exclusively for the violation of his constitutional rights *prior* to the institution of legal process, then the tort of false arrest or false imprisonment might "provide[] the proper analogy." *Wallace*, 549 U.S. at 389. That is because "[t]he sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*." *Id.* at 389-390 (emphasis in original); *see* Keeton et al., *supra*, § 119, at 885-886 ("If there is no process issued at all and the plaintiff is arrested without a warrant or any other valid basis for an arrest, there is no malicious prosecution but a false arrest.").

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taken in an investigatory capacity." *Hartman* v. *Moore*, 547 U.S. 250, 262 n.8 (2006). In the Second Circuit, a prosecutor can be liable if he "fabricate[s] evidence in his investigative role" and it was "at least reasonably foreseeable that in his advocacy role he would later use that evidence." *Zahrey* v. *Coffey*, 221 F.3d 342, 346-347, 353-354 (2d Cir. 2000); *see Michaels* v. *McGrath*, 531 U.S. 1118 (2001) (Thomas, J., dissenting from denial of certiorari) (agreeing with Second Circuit's approach to absolute immunity). Other circuits agree. *See Fields* v. *Wharrie*, 740 F.3d 1107, 1111-14 (7th Cir. 2014); *Beltran* v. *Santa Clara Cty.*, 514 F.3d 906, 908 (9th Cir. 2008) (en banc) (per curiam); *Prince* v. *Hicks*, 198 F.3d 607, 611-614 (6th Cir. 1999). No question of absolute immunity is before the Court in this case. It is not fairly included in the question presented, and it was not raised by the Brief in Opposition. *See* Sup. Ct. R. 14(1)(a); 15(2). And neither the district court nor the Second Circuit considered whether Smith would enjoy absolute immunity with respect to McDonough's fabrication claim. Any question of absolute immunity is properly left for remand. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

If a plaintiff brought a Section 1983 suit alleging the wrongful use of legal process for some purpose *outside* the process itself—say, to extort money from the victim—then the tort of abuse of process might provide the proper analogy. As this Court has explained, the "gravamen of that tort" is the "extortionate perversion of lawfully initiated process to illegitimate ends." *Heck*, 512 U.S. at 486 n.5; *see* Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process, ch. I, § 7, at 7-8 (1892); *Grainger* v. *Hill* (1838) 132 Eng. Rep. 769, 4 Bing. (N. C.) 212 (use of legal process to extort ship's register).[8]

The focus of McDonough's claim, by contrast, is the criminal process itself. And McDonough seeks relief only for the violation of his constitutional rights *after* the institution of legal process—specifically the initiation and maintenance of criminal proceedings. As this Court has made clear, his claim is thus analogous to the common law tort of malicious prosecution. *See Wallace*, 549 U.S. at 390; *Heck*, 512 U.S. at 483-484; *Mondragón* v. *Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008) ("After the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim."); *Bradford*, 803 F.3d at 388; *see also* Keeton et. al., *supra*, § 119,

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[8] Because the tort is focused on an injury *outside* the process itself, favorable termination is generally not a requirement. *See Mayer* v. *Walter*, 64 Pa. 283, 285-286 (1870) (citing *Grainger*); *see also* Keeton et. al., *supra*, § 121, at 897-898 ("[I]f the defendant prosecutes an innocent plaintiff for a crime without reasonable grounds to believe him guilty, it is malicious prosecution; if he prosecutes him with such grounds to extort payment of a debt, it is abuse of process." (footnote omitted)).

at 885-886 ("So long as the plaintiff has been detained by legal process, it cannot be said that he has been falsely imprisoned and the claim, if there is one, must be for malicious prosecution * * * ." (footnote omitted)).

Common law treatises and cases confirm that malicious prosecution is the most analogous tort—indeed, they have even described fabrication of evidence as one possible basis for a malicious prosecution suit. Sir Frederick Pollock's treatise *The Law of Torts*, for example, makes clear that in an action for malicious prosecution, it "is no excuse for the defendant that he instituted the prosecution under the order of a Court, if the Court was moved by the defendant's *false evidence* * * * and if the proceedings in the prosecution involved the repetition of the *same falsehood*." Sir Frederick Pollock, The Law of Torts 289 (4th ed. 1895) (emphases added). Otherwise, "the defendant would be allowed to take advantage of his own fraud upon the Court which ordered the prosecution." *Id.*; *see also* 4 William Blackstone, Commentaries *41-42 (In malicious prosecution action, the "vice of lying" is "taken notice of by our law," permitting "private recompence.").

Common law courts, moreover, have upheld malicious prosecution actions on facts involving fabricated evidence that are analogous to those here. In *Fitzjohn*, the plaintiff alleged that the defendant had procured the plaintiff's prosecution based on a falsified document. 142 Eng. Rep. at 199-200. The court held that the plaintiff's suit against the defendant for "maliciously * * * causing him to be prosecuted" was "maintainable," because the prosecution was "the result of the wrongful and malicious act." *Id.*; *see*

also id. at 204 (Blackburn, J., dissenting) (describing how "defendant had knowingly given false testimony before the county-court judge, with a view to make him believe that a forged receipt of the plaintiff was his genuine signature"); *see also* Pollock, *supra*, at 289 (citing *Fitzjohn*); *Coxe* v. *Smithe* (1662) 83 Eng. Rep. 327, 1 Lev. 119 (where plaintiff alleged that the defendant made a "false affidavit" against him, plaintiff had action for "malicious procurement" because "it was falsely and maliciously done").

Courts in this country have reached similar conclusions. To take one example, in *Schenck* v. *Butsch*, 32 Ind. 338 (1869), the Indiana Supreme Court upheld a conviction for malicious prosecution where the defendant had falsely accused the plaintiff of forgery before a grand jury, leading to the plaintiff's trial and acquittal. *See id.* at 339-341. In *Everett* v. *Henderson*, 14 N.E. 932 (Mass. 1888), the Massachusetts Supreme Court similarly stated that "maliciously making a false affidavit" supports "an action on the case for a malicious prosecution." *Id.* at 936.

In short, under this Court's precedent, common law cases and treatises, and early decisions of U.S. courts, McDonough's fabrication of evidence claim—which is grounded on the wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence—is analogous to the common law tort of malicious prosecution.

C. The Statute Of Limitations For Malicious Prosecution Governs McDonough's Section 1983 Fabrication Claim.

The tort of malicious prosecution follows a "distinctive" limitations rule. *Wallace*, 549 U.S. at 388. As this Court has recognized, the statute of limitations

for the tort of malicious prosecution does not begin to run until favorable termination. *See Heck*, 512 U.S. at 489-490. That conclusion is supported by common law treatises. *See* Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process, ch. IX, § 1, at 327 (1892); 2 H. G. Wood, A Treatise on the Limitation of Actions at Law and in Equity § 187d(4), at 878 (rev. 4th ed. 1916) ("Limitations begin to run * * * against an action for malicious prosecution when the prosecution is ended or abandoned."). It is also supported by early decisions of American courts. *See e.g.*, *Printup Bros. & Co.* v. *Smith*, 74 Ga. 157, 162 (Ga. 1885); *Lowe* v. *Wartman*, 1 A. 489, 489-490 (N.J. 1885); *Findley*, 1 Blackf. at 468.

The Court should apply the "distinctive" limitations rule that governs the common law tort of malicious prosecution to McDonough's Section 1983 claim. The purpose of that rule in the common law context is to regulate the relationship between criminal and civil proceedings involving the same underlying issues. In particular, the rule that the statute of limitations for malicious prosecution does not begin to run until favorable termination discourages "parallel litigation" and "conflicting resolutions" in two different proceedings. *Heck*, 512 U.S. at 484 (internal quotation marks omitted). As the California Supreme Court explained in 1899, the favorable termination rule "has always prevailed both in England and in this country" for that simple reason: "Proceedings in courts having jurisdiction of the person and of the subject-matter must be shielded from collateral attack." *Carpenter*, 59 P. at 302; *see also* Dan B. Dobbs et al., The Law of Torts § 590 (2d ed. 2018 update).

As in *Wallace*—where the Court adopted the "distinctive" common law limitations rule—the Court should hold that the statute of limitations for McDonough's Section 1983 claim based on fabrication of evidence did not begin to run until favorable termination. McDonough's claim is analogous to the common law tort of malicious prosecution because it challenges the initiation and maintenance of criminal proceedings and seeks damages for the period *after* the institution of legal process. *See supra* pp. 23-28. Fabrication claims of this sort create the same risk of parallel litigation—and the same potential for collateral attack on pending criminal proceedings—as a suit for malicious prosecution at common law. And the common law limitations rule is perfectly consistent with the "values and purposes of the constitutional right at issue," *Manuel I*, 137 S. Ct. at 921, while serving the practical concerns attending a suit to vindicate that right, *see infra* pp. 50-58. The Court should therefore adopt that limitations rule.

At common law, the statute of limitations for a malicious prosecution claim does not begin to run until favorable termination. *See Heck*, 512 U.S. at 489-490. McDonough was acquitted on December 21, 2012, and he filed this Section 1983 suit on December 18, 2015. Because McDonough filed suit within three years of the favorable termination of the criminal proceedings against him, his Section 1983 claim based on fabrication of evidence is timely, and the Second Circuit erred in dismissing it.

II. MCDONOUGH'S CLAIM IS ALSO TIMELY UNDER THE "STANDARD" RULE FOR ACCRUAL.

The Court should follow the "analogous tort" framework from *Wallace* laid out above, *supra* Part I. Under that framework, the Court can simply borrow the statute of limitations from the most analogous tort, without determining the elements of McDonough's fabrication of evidence claim.

If the Court applies the "standard" rule for accrual, however, the outcome is the same, for two reasons. First, a claim does not accrue until the plaintiff can actually maintain suit. *See Green*, 136 S. Ct. at 1777; *Bay Area Laundry*, 522 U.S. at 201. Under *Preiser* and *Heck*, McDonough was barred from bringing his Section 1983 claim prior to the termination of the criminal proceedings against him because he was in custody for habeas purposes. *See Heck*, 512 U.S. at 481-483; *Preiser*, 411 U.S. at 500. His claim accordingly did not accrue until those proceedings concluded. Second, the Court should adopt favorable termination as an element of McDonough's Section 1983 fabrication of evidence claim. Because that element was not satisfied until McDonough's acquittal, he did not have a complete cause of action until that point. His suit is timely for that reason as well.

A. Because *Preiser* And *Heck* Foreclose Section 1983 Suits Before Favorable Termination, Such Suits Do Not Accrue Until That Point.

There is a straightforward reason the Second Circuit erred by concluding that, under the "standard" rule, McDonough's fabrication of evidence claim accrued prior to favorable termination. As this Court has made clear, the statute of limitations does not "commence" until a "plaintiff is permitted to file suit." *Heimeshoff*, 571 U.S. at 106. That is because "[s]tarting the limitations clock ticking before a plaintiff can *actually* sue * * * serves little purpose." *Green*, 136 S. Ct. at 1778 (emphasis altered). Under *Preiser* and *Heck*, McDonough was unable to "actually sue" Smith for initiating and maintaining criminal proceedings against him prior to the termination of those proceedings. The statute of limitations for McDonough's Section 1983 claim thus did not begin to run until his acquittal.

The rule of *Preiser* is that when a person in state custody wishes to challenge the fact or duration of that custody, his "sole federal remedy is a writ of habeas corpus." 411 U.S. at 500. The Court has interpreted the meaning of "custody" broadly for purposes of *Preiser* to include defendants who, like McDonough prior to his acquittal, have been released on personal recognizance. *See Lydon*, 466 U.S. at 300-301; *Hensley* v. *Mun. Court, San Jose Milpitas Judicial Dist.*, 411 U.S. 345, 353 (1973).[9]

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[9] A criminal defendant in custody may be required to exhaust state remedies before obtaining habeas relief from a federal

Preiser would thus foreclose a pre-termination Section 1983 suit by a criminal defendant in McDonough's position challenging the initiation and maintenance of the proceedings against him. In such a case, the criminal defendant would be in pre-trial detention or released on personal recognizance subject to certain restrictions on his liberty; either way, the criminal defendant is in "custody" for purposes of *Preiser*. *Lydon*, 466 U.S. at 300-301; *Preiser*, 411 U.S. at 486 (habeas corpus is "the specific instrument to obtain release" for a petitioner "imprisoned prior to trial" (citing *Ex parte Royall*, 117 U.S. 241 (1886)). And a Section 1983 suit alleging that, because a state official fabricated evidence, there should be no criminal proceeding *at all*, would "necessarily" constitute a challenge to the lawfulness of the criminal defendant's custody. *See Heck*, 512 U.S. at 481-482, 487. It would thus be barred by *Preiser*. *See Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.6 (1975) (noting that, under *Preiser*, "habeas" would be the "exclusive remedy" for a person in pre-trial custody seeking "release"); *Manuel II*, 903 F.3d at 670. As a result of *Preiser*, then, a Section 1983 plaintiff in custody cannot "actually sue" in federal court to challenge the initiation and maintenance of the proceedings against him until those proceedings are

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court. *See Lydon*, 466 U.S. at 301; *Hensley*, 411 U.S. at 353. The fact that habeas may be unavailable prior to exhaustion does not open the door to a Section 1983 suit. *See Preiser*, 411 U.S. at 489-490 ("Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.").

over. *Green*, 136 S. Ct. at 1778. His Section 1983 claim thus does not accrue for limitations purposes until that time.

Indeed, this was the basic logic of the delayed accrual rule in *Heck*. That case lay "at the intersection" of Section 1983 and "the federal habeas corpus statute." 512 U.S. at 480. *Preiser* had "held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement." *Heck*, 512 U.S. at 481. *Heck* extended *Preiser* to a suit seeking monetary damages under Section 1983, where awarding damages would "call into question the lawfulness of conviction *or confinement*." *Id.* at 481, 483 (emphasis added). Under *Preiser*, the *Heck* Court held that such actions do not accrue "until the conviction or sentence has been invalidated." *Id.* at 490. While the civil plaintiff in *Heck* was a convicted prisoner, *Heck*'s rationale is not limited to that circumstance. Where a plaintiff suing under Section 1983 is in custody for purposes of the habeas statute, and challenges the lawfulness of that custody, the plaintiff's claim does not accrue until favorable termination. *See id.* at 489; *see also Lewis* v. *City of Chicago*, 914 F.3d 472, 478 (7th Cir. 2019).[10]

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[10] The Court did not analyze *Preiser*'s effect on the accrual of the claim in *Wallace*. At the time the suit was filed, the plaintiff was not in custody. *See Wallace*, 549 U.S. at 387. In *Wallace*, moreover, the plaintiff claimed that he had been arrested without probable cause *prior* to legal process. *Id.* at 389. While he was in detention without legal process, the statute of limitations did not begin to run. *Id.* at 389-390. After he was detained pursuant to legal process, a Section 1983 suit challenging the unlawful *initial* arrest presumably would

In this case, McDonough was in custody for purposes of *Preiser* until his acquittal. *See* Pet. App. 10a, 57a; *see also* JA180-181, ¶ 812. While in custody, McDonough's only avenue for challenging the initiation and maintenance of criminal proceedings against him on the basis of fabricated evidence was habeas corpus. *See Heck*, 512 U.S. at 482-483. Under the "standard" rule for accrual, McDonough thus could not maintain his Section 1983 suit against Smith until McDonough's acquittal. *See Green*, 136 S. Ct. at 1777-78. His Section 1983 claim based on fabrication of evidence accordingly did not accrue until favorable termination. For that reason, McDonough's Section 1983 suit is timely.

B. This Court Should Adopt Favorable Termination As An Element Of McDonough's Section 1983 Claim.

1. McDonough's suit is timely under the "standard" rule for yet another reason. Under that rule, a claim does not accrue until each of its elements has been satisfied. *See Green*, 136 S. Ct. at 1777-78. This Court should adopt favorable termination as an element of McDonough's Section 1983 suit, and conclude that the limitations clock did not begin to run until his acquittal.

The common law "provide[s] the appropriate starting point" for considering the elements of a Section 1983 claim. *Carey* v. *Piphus*, 435 U.S. 247, 258

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not have implicated the lawfulness of his subsequent custody. Thus *Preiser* would not necessarily have barred the Section 1983 suit in *Wallace* at any point after the statute of limitations began to run.

(1978); *see Manuel I*, 137 S. Ct. at 920. Where the "interests protected by a particular branch of the common law * * * parallel closely" the interests implicated by a particular Section 1983 claim, *Carey*, 435 U.S. at 258, the rules developed over the centuries at common law may serve "as a source of inspired examples" for a court defining the contours of the Section 1983 claim. *Hartman*, 547 U.S. at 258. That does not mean, of course, that the Court should woodenly transplant common law rules into the Section 1983 context. "In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel I*, 137 S. Ct. at 921.

The Court's decision in *Heck* exemplifies this analysis. There, a state prisoner had brought a Section 1983 suit alleging an "unlawful, unreasonable, and arbitrary investigation" leading to his arrest, the knowing destruction of exculpatory evidence, and the use of "an illegal and unlawful voice identification procedure" at trial. 512 U.S. at 479 (internal quotation marks omitted). The Court determined that the prisoner's suit could not proceed because, if successful, it would "necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. The prisoner was instead required to demonstrate that his conviction was "reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus" prior to filing a Section 1983 suit. *Id.* at 489.

In reaching that conclusion, the Court analogized the Section 1983 claim at issue to the tort of malicious prosecution. *Id.* at 484. In particular, it focused on that tort's favorable termination require-

ment, which embodies the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 486. As discussed above, the favorable termination requirement "avoids parallel litigation" and serves "the strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id.* at 484 (internal quotation marks omitted). It also prevents a "collateral attack" on a criminal proceeding through a civil suit. *Id.* at 485; *Carpenter*, 59 P. at 302. The "malicious-prosecution tort's favorable-termination requirement," moreover, is "helpful * * * in suggesting a relatively simple way to avoid collisions at the intersection of habeas and § 1983." *Heck*, 512 U.S. at 498 (Souter, J., concurring). For all of those reasons, the Court adopted favorable termination as an element of the Section 1983 claim at issue in *Heck*.

Those same considerations should lead the Court to adopt favorable termination as an element of McDonough's Section 1983 claim. The core of his claim is that Smith wrongfully initiated and maintained criminal proceedings against him on the basis of fabricated evidence. To allow such a claim to go forward prior to the termination of criminal proceedings would encourage (and in some cases require) parallel litigation in state and federal court. *See id.* at 484; *see infra* pp. 53-58. Termination must be *favorable*, moreover, for the simple reason that if McDonough had been convicted, his claim would have been barred by *Heck*.[11]

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[11] This is not to say, of course, that the Court should adopt *all* the elements of malicious prosecution. *See Manuel I*, 137 S. Ct.

McDonough has indisputably shown favorable termination: He was acquitted. As a result, he did not have a complete cause of action until that point, and his Section 1983 suit is timely under the "standard" rule. In the vast majority of cases, applying the favorable termination requirement will likewise be simple. A court need only ask whether the criminal defendant was acquitted, or whether his conviction was "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 487. If so, his Section 1983 claim may proceed.[12]

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at 921. "The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey*, 435 U.S. at 258. In order to answer the question presented in this case—which concerns only accrual—the Court need not determine what the other elements of McDonough's Section 1983 claim would be on the merits, because there is no dispute that favorable termination was the latest point at which McDonough's claim could have accrued.

[12] As this Court has held, the elements of a Section 1983 claim (such as favorable termination) should be "tailored to the interests protected by the particular right" in question. *Carey*, 435 U.S. at 259. So, for instance, courts have permitted Section 1983 suits to proceed where a conviction is overturned, even if criminal proceedings continue. *See, e.g.*, *Jackson* v. *Barnes*, 749 F.3d 755, 760-761 (9th Cir. 2014) (permitting Section 1983 suit where first conviction was overturned due to a constitutional violation, even though the defendant was subsequently reconvicted). In circumstances where a convicted defendant had *no* opportunity to challenge her conviction through habeas proceedings—because, say, she was sentenced to a fine or time

2. Adopting favorable termination as an element of McDonough's claim, moreover, is consistent with "the values and purposes of the constitutional right at issue." *Manuel I*, 137 S. Ct. at 921. There is no question that criminal defendants have a constitutional right not to be deprived of liberty based on evidence fabricated by the government. *See, e.g.*, *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (The "Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair * * * ."); *Briscoe* v. *LaHue*, 460 U.S. 325, 326 n.1 (1983) ("[K]nowing use of perjured testimony violates due process * * * ."); *Miller*, 386 U.S. at 7 (The "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."); *Napue*, 360 U.S. at 269 ("The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty * * * ."); *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) ("[P]erjured testimony, knowingly used by the State authorities to obtain [a] conviction" works "a deprivation of rights guaranteed by the Federal Constitution."); *Mooney*, 294 U.S. at 112 (due process is not satisfied "if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of

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served—requiring favorable termination may not be appropriate. *See Spencer* v. *Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, JJ., concurring); *id.* at 25 n.8 (Stevens, J., dissenting). The Court does not need to determine in this case how or whether to apply favorable termination in all contexts.

court and jury by the presentation of testimony known to be perjured"); *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 100 (1st Cir. 2013) (It is "self-evident" that "those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." (internal quotation marks omitted)); *Zahrey* v. *Coffey*, 221 F.3d 342, 355 (2d Cir. 2000) ("It is firmly established that a constitutional right exists not to be deprived of liberty on the basis of false evidence fabricated by a government officer.").

There is similarly no question that being indicted and criminally tried is a serious deprivation of liberty. Many criminal defendants are imprisoned while their criminal cases are pending. *See, e.g.*, *Gerstein*, 420 U.S. at 114. Others, like McDonough, are arrested and then released on personal recognizance subject to restrictions on their freedom. *See* Pet. App. 10a, 57a. Either way, arrest and prosecution are "public act[s] that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States* v. *Marion*, 404 U.S. 307, 320 (1971); *see Gerstein*, 420 U.S. at 114 ("Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty."); *Albright* v. *Oliver*, 510 U.S. 266, 277-278 (1994) (Ginsburg, J., concurring). As the district court held below, the allegations in McDonough's complaint "clearly state that [he] suffered a restraint on his liberty that extended beyond the arraignment itself." Pet. App. 57a. To

impose that restraint on the basis of fabricated evidence is not tolerable under the Constitution.

Though the courts of appeals have uniformly recognized that subjecting a defendant to criminal charges on the basis of fabricated evidence violates the Constitution, they have not been consistent about *which* provision of the Constitution has been violated. Some courts have found that the use of fabricated evidence to deprive a defendant of liberty violates the Due Process Clause. In *Devereaux* v. *Abbey*, 263 F.3d 1070 (9th Cir. 2001) (en banc), for example, the Ninth Circuit held that "there is a clearly established constitutional *due process right* not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Id.* at 1074-75 (emphasis added). This Court has similarly suggested that the use of fabricated evidence is a due process violation. *See Briscoe*, 460 U.S. at 326 n.1; *Miller*, 386 U.S. at 7; *Mooney*, 294 U.S. at 112.

Other courts have regarded a fabrication of evidence claim as a violation of the Fourth Amendment, at least when the claim involves pretrial deprivation of liberty. In *Lewis*, the Seventh Circuit interpreted this Court's opinion in *Manuel I* to hold that "the Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention" on the basis of fabricated evidence. 914 F.3d at 475; *see also Manuel I*, 137 S. Ct. at 917-918 ("look[ing] to the Fourth Amendment to analyze" a "pretrial restraint on liberty"); *Hernandez-Cuevas*, 723 F.3d at 100 ("We now further specify that one constitutional source of this 'self-evident' prohibition against manufactured evidence in the pretrial detention context is the

Fourth Amendment's guarantee of freedom from seizure but upon probable cause.").

On this view, a criminal defendant is "seized" by pretrial restraints on liberty. *See Manuel I*, 137 S. Ct. at 917; *Albright*, 510 U.S. at 277-279 (Ginsburg, J., concurring) (at "common law" the "difference between pretrial incarceration and other ways to secure a defendant's court attendance" was "a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite"). As the Second Circuit has held, "while a state has the undoubted authority, in connection with a criminal proceeding, to restrict a properly accused citizen's constitutional right to travel outside of the state as a condition of his pretrial release, and may order him to make periodic court appearances, such conditions are appropriately viewed as seizures within the meaning of the Fourth Amendment." *Murphy* v. *Lynn*, 118 F.3d 938, 946 (2d Cir. 1997); *see also Gallo* v. *City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998). And if the seizure occurs on the basis of fabricated evidence, it does not comport with the Fourth Amendment.

This Court need not decide in this case whether a Section 1983 claim based on fabrication of evidence should be textually housed within the Fourth Amendment or the Due Process Clause (or even within the Sixth Amendment).[13] Indeed, it may be

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[13] The Second Circuit has suggested that fabrication of evidence claims could arise under the Sixth Amendment, which guarantees a fair trial before an impartial jury. *See Morse* v. *Fusto*, 804 F. 3d 538, 547 n.7 (2d Cir. 2015); *see also Duncan* v. *Louisiana*, 391 U.S. 145, 155-158 (1968); *Nebraska Press Ass'n*

that *all* of those provisions are violated: "Certain wrongs" can "implicate more than one of the Constitution's commands." *Soldal* v. *Cook Cty.*, 506 U.S. 56, 70 (1992); *see, e.g.*, *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 50 (1993) ("[S]eizure of property implicates two explicit textual source[s] of constitutional protection, the Fourth Amendment and the Fifth." (second alteration in original; internal quotation marks omitted)). It is common ground that to initiate and maintain criminal proceedings against a defendant on the basis of fabricated evidence violates the Constitution, and the distinction between the Fourth Amendment, Sixth Amendment, and Due Process Clause does not impact the specific question presented in this case.

That is because the reasons for delaying the start of the limitations period until favorable termination would be exactly the same. And, whatever the precise textual source of McDonough's Section 1983 claim, delaying accrual until favorable termination is consistent with the values and purposes of the constitutional right at issue. This Court has specifically "recognized that the limitations period should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Green*, 136 S. Ct. at 1778 (internal quotation marks and brackets omitted). To hold that a criminal defendant's claim accrues at a time when he *cannot* bring suit because he remains in custody

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v. *Stuart*, 427 U.S. 539, 551 (1976) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors * * *." (internal quotation marks omitted)).

would undermine the basic constitutional right against the fabrication of evidence by government actors in criminal proceedings. *See infra* pp. 53-58 & n.15. Such an accrual rule could even operate to bar Section 1983 relief entirely, if a claim was foreclosed by *Preiser* and *Heck* throughout the entire limitations period. That is a particular danger in the many states with one or two-year limitations periods, which may expire before the criminal defendant is released from custody.

As explained below, moreover, even if a criminal defendant *could* bring a Section 1983 suit during the pendency of criminal proceedings, many would choose not to do so to avoid prejudicing their criminal defense or undercutting their Fifth Amendment privilege against self-incrimination. *See SEC* v. *Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980) (en banc); *see also infra* at pp. 55-57. A limitations rule that dissuades plaintiffs from vindicating the constitutional right at issue would not serve "the values and purposes" of that right. *Manuel I*, 137 S. Ct. at 921. For all of these reasons, if the Court reaches the issue, it should conclude that favorable termination is an element of McDonough's fabrication of evidence claim.

III. BECAUSE MCDONOUGH HAS ALLEGED A CONTINUING VIOLATION, THE STATUTE OF LIMITATIONS BEGAN TO RUN AT FAVORABLE TERMINATION.

McDonough's suit is also timely under the continuing violation doctrine. That doctrine holds that where the plaintiff complains of a "continuing violation" rather than a "discrete act," the statute of limitations does not begin to run until the violation

ends. *Havens Realty*, 455 U.S. at 380-381 (internal quotation marks omitted); *see also Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 (2002); *Heard* v. *Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001) (continuing violation doctrine is "a doctrine governing accrual"). The constitutional violation in this case was being subject to criminal proceedings on the basis of fabricated evidence, and the resulting loss of liberty. *See supra* pp. 23-24. Because that constitutional violation was continuing rather than discrete, the statute of limitations did not begin to run until criminal proceedings terminated in McDonough's favor.

Courts have long recognized that the "cause of action for a continuing tort * * * accrues afresh from day to day." *Hamilton* v. *Manhattan Ry. Co.*, 9 N.Y.S. 313, 315 (Super. Ct. 1890); *see also Drews* v. *Williams*, 23 So. 897, 899-900 (La. 1898). To take one example, the North Carolina Supreme Court held in *Shackelford* that where the clerk of court failed to index a judgment, the tort "was a continuous one, beginning from the day on which he failed to properly index the judgment * * * and continuing until he ceased to be clerk of the court." 23 S.E. at 102. The statute of limitations thus did not begin to run until the violation ceased. *See id.*

This Court has applied the continuing violation doctrine in Title VII cases alleging a hostile work environment, as well as to claims of racial discrimination. *See, e.g.*, *Morgan*, 536 U.S. at 117; *Havens Realty*, 455 U.S. at 380-381. As this Court explained in *Morgan*, where a claim "involves repeated conduct" that "occurs over a series of days or perhaps years," a claim is timely as long as "an act contrib-

uting to the claim occurs within the filing period." 536 U.S. at 115-117. Federal courts have relied on the continuing violation doctrine in many other contexts. *See, e.g.*, *DePaola*, 884 F.3d at 486 (deliberate indifference to prisoner's medical needs is a "continuing violation" under principles "of federal common law").

In *Manuel I*, this Court declined to reach whether the continuing violation doctrine applied to a Section 1983 claim premised on unlawful pretrial detention, instead leaving that issue for the lower court. 137 S. Ct. at 921-922. On remand, the Seventh Circuit concluded that the doctrine controlled and that the plaintiff's suit was timely. *See Manuel II*, 903 F.3d at 670. As Judge Easterbrook's opinion for the court explained, "[w]hen a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends." *Id.* at 669 (citing *Morgan*, 536 U.S. at 115-121). The court distinguished a "continuing *wrong*" from a "continuing *harm*," noting that "once the wrong ends, the claim accrues even if that wrong has caused a lingering injury." *Id.* Because detention without probable cause is a continuing wrong—and not simply a continuing harm—the court concluded that the statute of limitations began to run when the detention ended. *Id.* at 670.

The wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence—leading to the ongoing deprivation of liberty and constitutional rights—is a continuing violation. A legal proceeding "is a continuous, not an isolated event, because its effects persist from the initial filing to the final disposition of the case." *Whelan*, 953 F.2d at 673; *see Wilkinson* v. *Goodfellow-Brooks*

Shoe Co., 141 F. 218, 220-221 (C.C.E.D. Mo. 1905) ("[T]he institution of the proceedings and the subsequent appeal, if wrongfully done, constitute but one continuous tort * * * ."). "It is repetitive in that it represents the assertion, every day," of the claims against the defendant. *Whelan*, 953 F.2d at 673. "A lawsuit is thus different from the typical case of a mere failure to right a wrong and make the plaintiff whole." *Loumiet* v. *United States*, 828 F.3d 935, 948 (D.C. Cir. 2016) (internal quotation marks omitted).

Unlike a "single" wrongful act, "the commencement of a lawsuit is only the first link in a chain of conduct that does not end until the complaining party ceases prosecution of the suit." *Whelan*, 953 F.2d at 674; *see also Foss* v. *Whitehouse*, 48 A. 109, 112 (Me. 1901) (describing wrongful prosecution as a "continuous tort, though composed of numerous links"). Here, Smith's fabrications led to criminal charges—and two criminal trials—against McDonough. Being subject to criminal proceedings on the basis of fabricated evidence was an ongoing deprivation of McDonough's liberty and constitutional rights. *See supra* pp. 40-41. The constitutional violation thus continued throughout those proceedings, ending only when McDonough was acquitted. And the statute of limitations for McDonough's Section 1983 claim began to run at favorable termination, not at the initiation of the proceedings or at some point in-between. *See Manuel II*, 903 F.3d at 670; *see also Albright*, 510 U.S. at 277-280 (Ginsburg, J., concurring) (Because a criminal defendant "remain[s] effectively 'seized' for trial so long as the prosecution against him remain[s] pending," the "time to file the § 1983 action should begin to run not at the start,

but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges.").

This case, of course, is even stronger than one in which a prosecutor fabricates evidence at the outset of an investigation and then relies upon it at various stages of the pre-trial and trial proceedings. After all, Smith did not just fabricate evidence at a single point. He instead fabricated multiple pieces of evidence—from McGrath's fabricated statement prior to the convening of the grand jury, to the forged witness affidavits at the grand jury, to McInerney's fabricated statement prior to the first trial. *See supra* pp. 7-11. Multiple witnesses, moreover, falsely testified at both trials at Smith's urging. *See id.* And these fabrications were intimately linked to one another—McGrath's statement was an integral part of McDonough's indictment, and McInerney's statement was the basis for later fabrications at trial. *See* Pet. App. 66a-67a ("Plaintiff clearly alleged that Defendant McInerney's written statement served as a basis upon which the other witnesses fabricated their testimony * * * ."); *see also* JA153, ¶ 646 (Smith relied on McGrath's statement "to initiate the prosecution based on his false accusations"); JA151, ¶ 636 ("Brown and O'Malley later gave fabricated testimony consistent with McGrath's false accusation and that could not have happened unless they all acted in conspiracy * * * ."); JA178, ¶ 794 ("O'Malley's false testimony was given to be consistent with the false testimony of McGrath and Ogden and the prosecution theory * * * ."). In such circumstances, at a minimum, a continuing violation exists.

In its decision below, the Second Circuit rejected the continuing violation doctrine, and instead held

that the statute of limitations began to run as soon as McDonough became *aware* that fabricated evidence had been used against him. *See* Pet. App. 17a. Smith's violation of McDonough's constitutional rights, however, did not end the first time McDonough became aware of the fabrication. Indeed, it "cannot be said to" have occurred "on any particular day." *Morgan*, 536 U.S. at 115. The constitutional violation continued throughout the criminal proceedings. The continuous pendency of the wrongful criminal case itself deprived McDonough of liberty and imposed substantial emotional and financial burdens. Further, Smith continued to rely on fabricated evidence—and indeed continued to fabricate *new* evidence—against McDonough throughout the proceedings. The fact that McDonough may have been aware at certain points during the criminal process that the evidence against him was fabricated does not change the nature of the constitutional violation he suffered. If anything, it made his injury more acute. Requiring a defendant to endure a criminal prosecution and stand trial twice on the basis of fabricated evidence is a continuing constitutional wrong, regardless of when the defendant gains knowledge of the fabrication.

Even if the Second Circuit were correct, moreover, that the constitutional injury in this case was the *use* of fabricated evidence to deprive McDonough of liberty, *see* Pet. App. 13a, Smith's wrongful use of fabricated evidence—and McDonough's liberty deprivation—continued throughout the criminal proceedings. Smith investigated, indicted, and then tried McDonough twice on the basis of evidence Smith (and others) had fabricated. *See, e.g.*, JA45,

¶ 14; JA131, ¶ 526; JA229, ¶ 1094; JA250, ¶ 1200. That fabricated evidence was presented to two juries, which were duty-bound to "consider and weigh" it during deliberations. *Valencia* v. *Brown*, No. 08-cv-298, 2010 WL 8358087, at *3 (S.D.N.Y. Oct. 25, 2010) (quoting New York pattern jury instructions). Indeed, McDonough's first trial ended in a mistrial, and he was tried *again* on the basis of fabricated evidence. *See, e.g.*, JA234, ¶ 1125. His second jury was similarly bound to consider the fabricated evidence against McDonough, ultimately acquitting him. Throughout this period, McDonough suffered a liberty deprivation. To hold that McDonough's constitutional rights were violated only the *first* time fabricated evidence was used against him—but not the second, or the third—is to ignore the sustained violation of McDonough's rights in this case.

The initiation and maintenance of criminal proceedings on the basis of fabricated evidence is not "a cinematographic series of distinct" wrongs. *United States* v. *Kissel*, 218 U.S. 601, 607 (1910) (Holmes, J.). It is a continuing constitutional violation that persists until those proceedings terminate. The statute of limitations does not begin to run until the violation ends, which in this case occurred when McDonough was acquitted. McDonough filed suit within three years of his acquittal, making his suit timely.

IV. PRACTICAL AND POLICY CONCERNS STRONGLY MILITATE IN FAVOR OF STARTING THE LIMITATIONS PERIOD AT FAVORABLE TERMINATION.

The approach adopted by the Second Circuit is legally wrong. It is also bad policy. There is no

question that the Constitution protects criminal defendants from the willful fabrication of evidence by public officials. *See Mooney*, 294 U.S. at 112. In order to vindicate their constitutional rights, however, criminal defendants need to know when to file suit. Public officials similarly need to understand the scope of their liability, and courts need a clear rule to determine when a suit is timely. Favorable termination is a bright-line rule that is easy to calculate. The Second Circuit's contrary rule is difficult to administer, raises the specter of parallel litigation in the state and federal courts, and requires criminal defendants in many cases to sue the very officials who are pressing charges against them. For these reasons as well, the Court should hold that the statute of limitations for McDonough's Section 1983 claim based on fabrication of evidence began to run at favorable termination.

1. Although the Court has said that the fabrication of evidence is a practice that the Constitution "cannot tolerate," *Miller*, 386 U.S. at 7, fabrication remains a "disturbingly common cause of wrongful convictions." Cert.-Stage Amicus Br. of Criminal Defense Organizations et al. 4.[14] Section 1983 suits provide a federal avenue for holding those who violate the rights of criminal defendants accountable.

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[14] Such claims are prevalent in the courts of appeals. *See, e.g.*, *Garnett*, 838 F.3d at 279; *Black* v. *Montgomery Cty.*, 835 F.3d 358, 370 (3d Cir. 2016); *Webb* v. *United States*, 789 F.3d 647, 667-670 (6th Cir. 2015); *Avery* v. *City of Milwaukee*, 847 F.3d 433, 441-443 (7th Cir. 2017); *Riddle* v. *Riepe*, 866 F.3d 943, 947-948 (8th Cir. 2017); *Caldwell* v. *City & Cty. of San Francisco*, 889 F.3d 1105, 1108-09 (9th Cir. 2018).

See Manuel I, 137 S. Ct. at 916; *see also City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) ("[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983."). That is particularly important here, where Smith's actions cannot be characterized as an oversight or a mistake. Smith deliberately fabricated evidence, including witness affidavits, used in criminal proceedings against McDonough.

In an area of frequent litigation where the constitutional stakes are high, a clear limitations rule is needed. As Justice Scalia wrote, "any period of limitation is utterly meaningless without specification of the event that starts it running." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring in part and concurring in the judgment). Under the Second Circuit's rule, however, it is anyone's guess as to when the statute of limitations begins to run in a particular case. The exact point at which the criminal defendant knew, or should have known, that fabricated evidence was being used against him is a question of fact that could be litigated for *years* before a court reaches the merits of a Section 1983 claim. And it provides criminal defendants (and their attorneys) little guidance on when to file suit.

Nor will the Second Circuit's rule benefit public officials, who will be unable to calculate with certainty when their Section 1983 liability draws to a close. *See Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14 (2014) (limitations periods "embody a policy of repose, designed to protect defendants" and foster certainty about a defendant's liability (internal quotation

marks omitted)); *see also Missouri* v. *McNeely*, 569 U.S. 141, 166 (2013) (Roberts, C.J., concurring in part and dissenting in part) (advocating in favor of straightforward rules to guide public officials). Protracted litigation over whether a criminal defendant in fact knew about a fabrication—or instead merely guessed that the evidence was fabricated—is of no service to public officials, either.

Without clear guidance, courts will similarly struggle to determine the boundaries of the limitations period. Under the Second Circuit's approach, judges will be forced to engage in a fact-intensive inquiry to determine when the statute of limitations began to run in each case. *Cf. Novella* v. *Westchester Cty.*, 661 F.3d 128, 148 (2d Cir. 2011) (remanding for a "fact-dependent inquiry into" when each plaintiff knew or should have known of the fact triggering the statute of limitations). "[S]carce judicial resources" are better spent elsewhere. *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009); *see also Grupo Dataflux* v. *Atlas Glob. Grp., L.P.*, 541 U.S. 567, 582 (2004) (rejecting approach that requires "collateral litigation" as "wasteful").

2. Apart from its lack of clarity, the Second Circuit's limitations rule has a more fundamental problem: It encourages premature litigation, while creating a risk of parallel state and federal proceedings.[16] In many states, the statute of limitations for

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[16] Of course, if this Court agrees that *Preiser* would bar suits like McDonough's prior to favorable termination, *see supra* pp. 32-35, and that the statute of limitations begins to run at that point, this particular policy concern would largely be obviated. If, however, the Court were both to adopt the Second Circuit's

filing a Section 1983 claim is very short. Kentucky, Louisiana, and Tennessee, for example, have a one-year statute of limitations for personal injury torts. *See, e.g.*, *Hall* v. *Spencer Cty.*, 583 F.3d 930, 933 (6th Cir. 2009) (Kentucky); *Heath* v. *Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 739 (5th Cir. 2017) (Louisiana); *Mills* v. *Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (Tennessee). Other states have a two-year statute of limitations. *See, e.g.*, *Maldonado* v. *Harris*, 370 F.3d 945, 954 (9th Cir. 2004) (California); *Winfrey* v. *Rogers*, 901 F.3d 483, 492 (5th Cir. 2018) (Texas), *petition for cert. filed*, No. 18-1024 (Jan. 31, 2019); *DePaola*, 884 F.3d at 486 (Virginia).

Many, if not most, criminal proceedings that go to trial last longer than one or two years. In the Bronx, for instance, misdemeanors that reach jury verdicts take nearly 30 months to complete. *See* Cert.-Stage Amicus Br. of Criminal Defense Organizations et al. 19. In Cook County, Illinois, defendants may be held up to *five years* awaiting trial. *See id.* And in McDonough's own case, the time between indictment and acquittal was almost three years. Given the length of criminal proceedings in many jurisdictions, it will be common for a criminal defendant's fabrica-

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accrual rule and hold that *Preiser* bars suits prior to favorable termination, it would give rise to a far graver concern: Some criminal defendants would be barred from bringing a Section 1983 suit until *after* the statute of limitations has expired. Such a result could effectively wipe out a category of meritorious Section 1983 suits alleging serious misconduct by state officials. That possibility is yet another reason that the limitations period should not begin to run until favorable termination.

tion of evidence claim to become time-barred while criminal proceedings are underway.

To preserve a meritorious fabrication claim, some criminal defendants may choose to file a protective Section 1983 suit while criminal proceedings are still ongoing—even if the criminal defendant would have ultimately chosen not to file suit after his acquittal. As this Court stated in *Panetti*, a rule that obliges "conscientious defense attorneys" to file unripe suits adds "to the burden imposed on courts, applicants, and the States, with no clear advantage to any." 551 U.S. at 943; *see also Klein* v. *City of Beverly Hills*, 865 F.3d 1276, 1279 (9th Cir. 2017) (per curiam) (rejecting rule that forces litigants to file unripe Section 1983 suits).

Other criminal defendants will choose not to bring meritorious civil suits in order to avoid prejudice to ongoing criminal proceedings. Those defendants may fear that filing a civil suit will provoke prosecutors to seek greater penalties, or to avoid dropping charges, in the proceedings against them. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978) (recognizing "the potential for both individual and institutional abuse" created by "the breadth of discretion that our country's legal system vests in prosecuting attorneys"). As this Court stated in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), fear of prosecutorial vindictiveness "may unconstitutionally deter a defendant's exercise" of his constitutional rights. *Id.* at 28 (internal quotation marks omitted). After all, if the criminal defendant is convicted, *Heck* bars a Section 1983 suit for any "harm caused by actions whose unlawfulness would render [the] conviction or sentence invalid." *See* 512 U.S. at 486-487.

Under Rule 8 of the Federal Rules of Civil Procedure, moreover, a plaintiff seeking damages based on fabrication of evidence is required to explain, in detail, why the evidence is fabricated. *See Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). Many lawyers would advise their clients not to make public statements regarding the evidence against them in a criminal proceeding, particularly if they are considering testifying at a criminal trial. "At minimum," Rule 8's pleading standard "requires an innocent accused to assert myriad facts—perhaps unknown to prosecutors—and reveal defense strategies to establish innocence before the criminal trial even begins." Cert.-Stage Amicus Br. of Criminal Defense Organizations et al. 13-14. Indeed, parallel civil and criminal proceedings may "undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits" of the criminal discovery rules, "expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." *Dresser Indus.*, 628 F.2d at 1376.

Once a civil suit has been filed, public officials at "a minimum" will be required to respond to the criminal defendant's initial filing. Cert.-Stage Amicus Br. of Cause of Action Institute 9. Even if the suit is ultimately stayed or dismissed, officials will expend time and resources seeking that outcome, and then defending it on appeal. *See, e.g.*, *Tribble* v. *Tew*, 653 F. App'x 666, 666-667 (11th Cir. 2016) (per curiam) (litigating issue of stay in the Eleventh Circuit); *see also Boyd* v. *Farrin*, 575 F. App'x 517, 518-521 (5th Cir. 2014) (per curiam) (litigating issue of stay in the Fifth Circuit).

If a Section 1983 suit is *not* stayed, public officials may have to sit for depositions and answer discovery while parallel criminal proceedings are still underway. Unlike criminal cases, civil discovery "requires nearly total mutual disclosure of each party's evidence prior to trial." *Afro-Lecon, Inc.* v. *United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987); *see also Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 510-511 (1989). Criminal defendants, too, may have to answer questions in a deposition regarding what they know about evidence being used against them at trial—a procedure completely "at odds with the structure and goals of the criminal justice system." Cert.-Stage Amicus Br. of Criminal Defense Organizations 12.

Although many federal courts may choose to stay a Section 1983 suit based on fabrication of evidence while criminal proceedings are ongoing, other courts, including the court of appeals below, have suggested a stay is not mandatory. *See* Pet. App. 16a n.13 ("[T]here may be circumstances where the district court might exercise its discretion to stay the civil action until the criminal case is resolved * * *."). District courts have "broad discretion" to stay or not stay "proceedings as an incident to [their] power to control [their] own docket[s]." *Clinton* v. *Jones*, 520 U.S. 681, 706 (1997). In some courts, civil claims may proceed in parallel with criminal proceedings—precisely what this Court cautioned against in *Heck*. *See Heck*, 512 U.S. at 484; *see, e.g.*, *Boyd*, 575 F. App'x at 520 (permitting litigation of motion to dismiss Section 1983 suit while criminal proceedings are pending); *Scheuerman* v. *City of Huntsville*, 373 F. Supp. 2d 1251, 1257-58 (N.D. Ala. 2005) ("[T]he court finds both plaintiff and the public have a

strong interest in the timely disposition of this civil rights action.").

To encourage premature suits would be in deep tension with the policy embodied in *Younger* v. *Harris*, 401 U.S. 37 (1971). *Younger* "preclude[s] federal intrusion into ongoing state criminal prosecutions." *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 78 (2013). Thus, "[w]hen there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution." *Id.* at 72. By its own terms, *Younger* applies only to actions seeking equitable relief, not an action for damages under Section 1983. *See Younger*, 401 U.S. at 43-44. A district court could, of course, stay a Section 1983 suit pending the outcome of criminal proceedings. *See Heck*, 512 U.S. at 487 n.8; *Wallace*, 549 U.S. at 393-394; *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 730 (1996). But that may not always happen, and just the process of filing suit and briefing the stay issue would be a burden on both the criminal defendant and state officials as they gear up for trial. To have a statute of limitations rule that compels criminal defendants to file protective suits is not just impracticable but an affront to federalism.

* * *

Starting the limitations period at favorable termination is a clear rule that benefits criminal defendants, public officials, and courts. It is consonant with this Court's desire to avoid parallel litigation in state and federal courts, *Heck*, 512 U.S. at 484, and it respects the integrity of state criminal proceedings. At common law, courts delayed the start of the limitations period to the end of criminal proceedings to shield those proceedings "from collateral attack."

Carpenter, 59 P. at 302. This Court should apply that rule to McDonough's Section 1983 claim based on fabrication of evidence.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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